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REDEFINING MOTHERHOOD: DISCRIMINATION IN LEGAL PARENTHOOD IN JAPAN

Rachel Brehm King[†]

Abstract: Due to Japan's decreasing population numbers and low birth rate, the country's legal forces and social norms put tremendous pressure on women to have children. To meet these expectations, Japanese women frequently turn to new forms of medical assistance called Assisted Reproductive Technology ("ART") to increase their ability to become mothers. ART includes such procedures as artificial insemination, in vitro fertilization, and surrogacy. Although several of these methods are accepted by Japanese law and society, other forms of ART, including certain forms of artificial insemination and surrogacy, are strongly disapproved. Japan's current legal framework prevents women from accessing the full range of ART methods by restricting access to procedures that fail to conform to traditional standards on reproduction. Legal recognition of motherhood is also restricted to births performed in a narrow set of circumstances.

Whereas Japanese law and social norms strictly limit a woman's ability to utilize ART, laws provide men with greater access to ART procedures and broader recognition of fatherhood. This unequal treatment in the availability of ART on the basis of gender discriminates against Japanese women, violating both the Japanese Constitution and the Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"). To correct this problem and protect Japanese women, the Japanese government must enact new legislation that recognizes modern concepts of parenthood and eliminates the discriminatory effect of its current laws.

I. INTRODUCTION

If you had stumbled across the scene playing out in a March interview with the Japanese newspaper Yomiuri Shimbun, you would not have immediately recognized the situation as something unusual: a young married couple, both in their twenties, the wife holding their brand new baby boy on her lap, with a woman in her fifties, clearly an adoring grandmother, looking on.¹ In fact, the grandmother is also the baby's birth mother, having served as a surrogate for her daughter.² Born without a womb, the daughter and her mother knew since high school that the daughter would not be able to have children in a traditional way.³ However, both desired the daughter to be a mother to her own children.⁴ To this end, doctors at the Suwa Maternity Clinic fertilized the wife's eggs with her husband's sperm and successfully

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¹ See *Daughter Thanks Mom for Surrogate Baby*, DAILY YOMIURI, Mar. 1, 2008.

² See *id.*

³ See *id.*

⁴ See *id.*

implanted the eggs into the womb of her mother.⁵ Said the new mother: “There are a lot of women who suffer from the same affliction as me, as well as those who have their womb surgically removed. It’s not right to put obstacles in the way of their happiness.”⁶

Such a family faces many obstacles in Japan, as there are many social and legal implications involved in a family’s fertility decisions. First, the family must find a doctor willing to perform the procedure. Although there is no law prohibiting surrogacy in Japan, the procedure is banned by the Japan Society of Obstetrics and Gynecology (“JSOG”).⁷ Doctors who perform procedures prohibited by the rules of JSOG risk losing their license to practice medicine. Dr. Yahiro Netsu of the Suwa Maternity Clinic, one of the few doctors who performs the procedure in Japan, has already been expelled and reinstated once by JSOG.⁸

Next, the idea of surrogacy itself is controversial in Japanese society. While her child grew in her mother’s womb, the daughter began to stuff her shirt so as to appear to be pregnant to disguise the surrogacy from disapproving eyes.⁹ The family did not reveal their identity when granting the interview. Although such interviews are rare due to intense stigmatization in Japanese society, this is actually the fourth documented arrangement between mother and daughter in Japan in the last ten years.¹⁰

Finally, after the birth of the child, he or she must be registered in the family’s *koseki*, or family registry.¹¹ Under the Family Registration Law, incorporated in the Japanese Civil Code, in this case the child will be registered as the child of the grandmother.¹² The parents may only adopt the child, despite the fact that they are biologically the genetic parents of the child.¹³ This risks additional social implications, as both adoption and infertility both are considered “impurities” which mar the family’s *koseki*.¹⁴

In contrast, had the husband of the young couple, not the wife, experienced infertility problems, the couple could have sought out third-

⁵ See *id.*

⁶ *Id.*

⁷ See Mayumi Mayeda, *Present State of Reproductive Medicine in Japan—Ethical Issues with a Focus on Those Seen in Court Cases*, BMC MED. ETHICS, Apr. 5, 2006, available at <http://biomedcentral.com/1472-6939/7/3>.

⁸ See *84 Women Give Birth Using Donated Ova, Sperm*, DAILY YOMIURI, July 16, 2007.

⁹ See *Surrogate Moms Emerge from Shadows*, CHINA DAILY, Mar. 14, 2008.

¹⁰ See *Daughter Thanks Mom for Surrogate Baby*, *supra* note 1.

¹¹ See Taimie Bryant, *For the Sake of the Country, For the Sake of the Family: The Oppressive Impact of Family Registration on Women and Minorities in Japan*, 39 U.C.L.A. L. REV. 109, 112 (1991).

¹² See *Daughter Thanks Mom for Surrogate Baby*, *supra* note 1.

¹³ *Id.*

¹⁴ See Bryant, *supra* note 11, at 133.

party donor sperm, and registered the resulting child under their own names in the family registry with relatively little legal interference.¹⁵

Scientific advances in the field of Assisted Reproductive Technology (“ART”) create new opportunities for reproduction, including artificial insemination, in vitro fertilization, and surrogacy.¹⁶ The continuing development of new technology challenges traditional Japanese notions of what it means to be a “parent.” Some of these ART procedures, including artificial insemination, are accepted by the public and the government.¹⁷ Other forms of assisted reproduction spur controversy, however, over whether children born through surrogacy or adoption can be registered as the child of the applicant parents.¹⁸ The Japanese government is currently studying the addition of official barriers to surrogacy and other forms of ART. Days after the interview in March, a panel studying surrogacy issued a report stating that surrogate births should be banned in Japan.¹⁹

At the same time that the use of ART procedures is discouraged, social and cultural forces, reinforced by law, compel couples to seek out ART procedures. Recent demographic trends, such as a low national birth rate and a decreasing population, put incredible pressure on Japanese couples to reproduce.²⁰ Furthermore, Japanese society retains a strong social preference for maintaining the traditional family structure.²¹ The social implications of adoption and infertility additionally reinforce the need to have children in a traditional manner in order for families to register their children in accordance with the Family Registration Law.²² Even if Japanese women can afford to travel abroad to access assisted reproductive therapies, they may not be recognized as mothers once they return to Japan, despite carrying documentation that establishes a genetic relationship with the child.²³

The absence of legal provisions addressing ART, as well as the stigmatizing impact of the Family Registry, subject women in Japan to discrimination by granting preferential treatment to men. Discrimination on the basis of gender and family origin violates both the Japanese Constitution

¹⁵ MINPŌ (Civil Code), art. 779, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf>.

¹⁶ See Mayeda, *supra* note 7.

¹⁷ See *Clear Guidelines Needed*, ASAHI SHIMBUN, July 24, 1998.

¹⁸ See *Surrogate Births Raise Complex Issues*, JAPAN TIMES, Oct. 21, 2006.

¹⁹ See *id.*

²⁰ See Suvendrini Kakuchi, *Japan's Fertility-Treatment Boom Pressures Women*, WOMEN'S E-NEWS, Jan. 13, 2004, available at <http://www.womensenews.org/article.cfm/dyn/aid/1673/>.

²¹ See Bryant, *supra* note 11, at 111; see also Mayeda, *supra* note 7.

²² See Bryant, *supra* note 11, at 133.

²³ See 61 Minshū 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

and the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (“CEDAW”), an international treaty ratified by Japan, which prohibits structural or actual discrimination.²⁴ Further, the failure to provide women with legal access to ART violates Japan’s constitutional equal protection guarantees, as well as provisions in CEDAW. Japan must prevent illegal discrimination against women by providing a statutory framework for equal access to ART and legal parenthood or by removing legal barriers and working to eliminate social norms that create the differences in treatment between men and women.

This Comment argues that the lack of legal framework regulating ART and the effect of the Family Registration Act restrictions discriminate against women in violation of international and Japanese equal protection standards. Part II outlines Japanese legal provisions that prohibit discrimination.²⁵ Part III analyzes how Japan’s existing legal structures prevent women from having the same access to ART procedures and legally recognized parenthood as men in violation of Japanese law.²⁶ Part IV argues that legislative action is necessary, discussing several legislative proposals.²⁷ Part V concludes by urging action to rectify constitutional violations and harmful discrimination against women.²⁸

II. JAPANESE LAW GUARANTEES THAT ALL PEOPLE WILL BE TREATED EQUALLY UNDER THE LAW

The Japanese Constitution and CEDAW prohibit government actions that prefer one gender or the other, either facially or in resulting practice.²⁹ Judicial interpretations have limited this prohibition by holding that the resulting discrimination must be “unreasonable.”³⁰ However, even under this strict standard, discriminatory treatment against women who choose ART methods for reproductive assistance creates unreasonable discrimination and violates Japanese equal protection laws.³¹

²⁴ KENPŌ (Constitution), art. 14, available at <http://www.solon.org/Constitutions/Japan/English/english-Constitution.html>; Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> [hereinafter CEDAW].

²⁵ See *infra* Part II.

²⁶ See *infra* Part III.

²⁷ See *infra* Part IV.

²⁸ See *infra* Part V.

²⁹ KENPŌ, art. 14; CEDAW, *supra* note 24.

³⁰ See Christina Luera, *No More Waiting for Revolution: Japan Should Take Positive Action to Implement the Convention on the Elimination of all Forms of Discrimination Against Women*, 13 PAC. RIM. L. & POL’Y J. 611, 621 (2004).

³¹ See *infra* Part III.

A. *Japan's Constitutional Law Prohibits Discrimination*

Discrimination on the basis of sex violates fundamental individual rights and equal protection guarantees in the Japanese Constitution. Article 14 of the 1947 Japanese Constitution states, "All of the people are equal under the law and there shall be no discrimination in political, economic, or social relations because of race, creed, sex, social status, or family origin."³²

Article 24 affirms the "essential equality of the sexes" in marriage and mandates that marriage "shall be maintained through mutual cooperation with the equal rights of husband and wife as a basis."³³ Article 13 protects the right to pursue happiness, which has been interpreted to include the right to have children.³⁴ Additionally, Japan's Supreme Court noted that Articles 13 and 24 should be "fully respected when examining the constitutionality of a law related to family"³⁵ The 1947 Constitution was intended to "imbed both the concept of equality and the equal protection principle deeply in all political, economic, and social relations, and to prevent legally permissible discrimination"³⁶

Although Article 81 of the Constitution provides for judicial review of legislation to determine constitutionality,³⁷ Japanese courts often defer to legislators.³⁸ In reviewing possible constitutional violations, the Supreme Court employs mild scrutiny.³⁹ In the equal protection context, the Supreme Court "has never resorted to strict judicial scrutiny and has been reluctant to develop standards from which heightened judicial scrutiny might be derived."⁴⁰ Often, Japanese courts will compare the individual right at stake to the "public welfare,"⁴¹ reflecting Japan's "preference for communitarian values despite respect for principles associated with an ideology of equality."⁴²

³² KENPŌ, art. 14.

³³ *Id.* art. 24.

³⁴ *Id.* art. 14; *see* Mayeda, *supra* note 7.

³⁵ 49 Minshū 7 (Sup. Ct., July 5, 1995), *available at* <http://www.courts.go.jp/english/judgments/text/1995.07.05-1991-Ku-No.143-155301.html>

³⁶ Hidenori Tomatsu, *Equal Protection of the Law*, in JAPANESE CONSTITUTIONAL LAW 187, 187 (Percy R. Luncy, Jr. & Kazuyuki Takahashi eds., 1993).

³⁷ KENPŌ, art. 81 (stating that "[t]he Supreme Court is the court of last resort with power to determine the constitutionality of any law, order, regulation, or official act.")

³⁸ *See* Tomatsu, *supra* note 36, at 202.

³⁹ *See id.*

⁴⁰ *See id.*

⁴¹ *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L.REV. 652, 693 n. 142 (2005).

⁴² *See* Bryant, *supra* note 11.

B. The CEDAW Prohibits “Actual” Discrimination

In addition to the modern Constitution, discriminatory laws violate the CEDAW, an international treaty that aims to eradicate all legal, political, social, and cultural structures that cause discrimination against women.⁴³ Implementation of CEDAW requires not just making government structures gender neutral but achieving actual gender equality.⁴⁴ Specifically, Article 2(f) of CEDAW requires Japan “[t]o take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.”⁴⁵ CEDAW obligations require that member states eliminate not just structural or governmental impediments to equality, but social and community impediments as well. CEDAW provides several specific provisions indicating exactly the kind of discrimination a state should work to eradicate.

For example, Article 16(d) of CEDAW provides that signing states must agree to ensure that men and women have “the same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children”⁴⁶ Additionally, Article 12, Section 1 requires that “Parties shall take all appropriate measures to eliminate discrimination against women in the field of health care in order to ensure, on a basis of equality of men and women, access to health care services, including those related to family planning.”⁴⁷ CEDAW also requires that women have equal rights “with respect to the nationality of their children” and “to acquire, change, or retain their nationality.”⁴⁸

CEDAW requires the Japanese Government to take affirmative action.⁴⁹ Article 98(2) of the Japanese Constitution states that treaties “shall be faithfully observed.”⁵⁰ Under Japanese law, treaties enjoy a status inferior to the Constitution but superior to legislation.⁵¹

⁴³ See CEDAW, *supra* note 24.

⁴⁴ See Luera, *supra* note 30.

⁴⁵ See CEDAW, *supra* note 24.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ KENPŌ, art. 98, para. 2; Meryll Dean, JAPANESE LEGAL SYSTEM 133 (Cavendish Publishing Limited 2002) (1997).

⁵¹ See Dean, *supra* note 50.

Japan ratified CEDAW in 1985.⁵² In order to further the goals of CEDAW, the Diet, Japan's legislature, passed the *Danjo Kyōdō Sankakushakai Kihonho* [Basic Law for a Gender-Equal Society] ("Basic Law") in 1999.⁵³ The preamble to the Basic Law explains that "it has become a matter of urgent importance to realize a Gender-equal Society in which men and women respect the other's human rights and share their responsibilities, and every citizen is able to fully exercise their individuality and abilities regardless of gender."⁵⁴ The legislation's stated goal is to move toward a gender-equal society, including working through state and local governments with regard to the "formation of a Gender-equal Society in all fields."⁵⁵ Article 8 of the Basic Law states, "The State is responsible for the comprehensive formulation and implementation of policies related to promotion of [the] formation of a Gender-equal Society (including positive action)."⁵⁶ The statute defines "positive action" as limited to action "within the necessary limits,"⁵⁷—that is, only "reasonably necessary" action.⁵⁸ CEDAW, as adopted by Japan, and the correlating Basic Law, prohibits actual discrimination by either the government or society in general.⁵⁹ The Japanese government is obligated, under the provision of the treaty to take action to eradicate that discrimination when it occurs.

C. *Japanese Courts Apply a "Reasonableness" Test to Determine Whether Gender Discrimination Is in Violation of Japanese Law*

Article 14 of Japan's Constitution protects women only from discrimination deemed "unreasonable" by the government, under current judicial interpretation in Japanese courts.⁶⁰ In 1995, the Supreme Court stated that:

Article 14, paragraph 1 of the Constitution provides for equal treatment under law. It is intended to prohibit discrimination without a reasonable ground. Differentiation in the legal treatment on the ground of the difference in economic, social,

⁵² See Division for the Advancement of Women, Department of Economic and Social Affairs, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Oct. 28, 2008).

⁵³ See Luera, *supra* note 30, at 626.

⁵⁴ Basic Law for a Gender Equal Society, Law No. 78 of 1999, pmb., (translation available at www.gender.go.jp/english/basic_law) [hereinafter Basic Law].

⁵⁵ *Id.*

⁵⁶ See Basic Law, *supra* note 54.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See Luera, *supra* note 30, at 613.

⁶⁰ See *id.* at 619.

and other various factual relations concerning individuals is not against this provision, insofar as the differentiation is reasonable.⁶¹

The dissenting Supreme Court Justices expanded on this by explaining that Article 14 is understood to mean that:

[I]n the light of the dignity of individuals which is a fundamental idea of democracy, discriminative treatment against it should be eliminated. This provision does not prohibit all discrimination; it allows differentiation based upon a reasonable ground in accordance with the nature of the matter. What is reasonable should be examined in the light of the nature of the matter.⁶²

Thus, the Supreme Court summarizes the requirement that challengers to discrimination must prove not just that such discrimination is occurring, but that it is unreasonable. The dissenters clarify that a law is unreasonable when it “lacks a substantial relationship between the purpose of legislation and means of achieving it.”⁶³

The concurring opinion of Justices Hideo Chikusa and Shinichi Kawai provides additional insight into the question of reasonableness under Article 14.⁶⁴ The Justices explained that:

In general, it is possible that provision of a law had a reasonable ground at the time of enactment, but with the passing of time, circumstances involving the subject matter change and the reasonableness of the given provision becomes questionable. The normal way of dealing with such a situation is by legislative measures, such as the amendment or abolition of the provision in question or enactment of a new law. It goes without saying that this is the most desirable way of dealing with such a situation.⁶⁵

Although not relevant to the case at hand, the Justices further explained:

⁶¹ 49 Minshū 7 (Sup. Ct., July 5, 1995) (holding that providing different amounts of inheritance to illegitimate children versus legitimate children did not violate Article 14's equal protection provision because it was not unreasonable), *available at* <http://www.courts.go.jp/english/judgments/text/1995.07.05-1991-Ku-No.143-155301.html>.

⁶² *See id.* (Toshijiro Nakajima, J., Masao Ono, J., Hisako Takahashi, J., Yukinobu Ozaki, J., Mitsuo Endo, J., dissenting).

⁶³ *See id.*

⁶⁴ *See id.* (Hideo Chikusa, J., and Shinichi Kawai, J., concurring).

⁶⁵ *See id.*

[I]f the reasonableness of a particular provision of law has been lost in a significant way, and has reached the level that in the light of Article 14, paragraph 1 of the Constitution, it cannot possibly be tolerated, its application must be immediately excluded by the court declaring that the given provision is unconstitutional without waiting for legislative measures to be taken.⁶⁶

The dissenters emphasized that once the Supreme Court finds that a law causes unreasonable discrimination, it has the power to declare the law unconstitutional. The Court prefers, however, that the Diet intervene with legislation before such a measure is required.

Japanese courts do not have a test for weighing the “reasonableness” of gender discrimination.⁶⁷ Instead, courts employ a case by case method of analysis.⁶⁸ The principal of equal protection developed slowly in Japanese courts.⁶⁹ One important case provides an example of how Japanese courts make a determination that a law “unreasonably” violates equal protection guarantees.⁷⁰ In 1973, the Supreme Court held a provision of the Criminal Code unconstitutional because it provided for an extreme difference in punishment for a person who kills a parent or other lineal ascendant as compared to the more lenient treatment of murder of a stranger.⁷¹ The Court was divided, with the concurring judges arguing that the statutory provision violated equal protection provisions.⁷²

The ratification of CEDAW in Japan supports the movement toward enforcing equal protection guarantees. However, Japanese courts’ reluctance to enforce the right to a private cause of action as required by CEDAW prevents progress.⁷³ Also, judicial interpretation has limited CEDAW by reading it as prohibiting only “unreasonable discrimination.”⁷⁴ Even so, recent cases increasingly recognize “changing social attitudes about gender

⁶⁶ See *id.*

⁶⁷ See Catherine Brown, *Japanese Approaches to Equal Rights For Women: The Legal Framework*, 12 *LAW IN JAPAN* 29, 44 (1979), reprinted in *COMPARATIVE LAW, LAW AND THE LEGAL PROCESS IN JAPAN* 594, 603 (Kenneth L. Port ed., 1996).

⁶⁸ See *id.*

⁶⁹ See Tomatsu, *supra* note 36, at 188.

⁷⁰ See *id.*

⁷¹ See *id.*

⁷² See *id.* at 190.

⁷³ See CEDAW, *supra* note 24, Article 2(c) (stating that parties guarantee “[t]o establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;”); Luera, *supra* note 30, at 619.

⁷⁴ See Luera, *supra* note 30, at 619.

and family . . .”⁷⁵ in Japan. Japanese courts also seem more willing to acknowledge and redress gender discrimination by rejecting traditional assumptions about femininity.⁷⁶

III. THE CURRENT ART FRAMEWORK VIOLATES EQUAL PROTECTION BY LIMITING ACCESS TO ART AND RECOGNITION OF MOTHERHOOD

Japanese norms tell women they must reproduce. At the same time, various actors limit women’s access to infertility technologies while men have increasingly more access. Even if a woman does obtain access to ART and produces a child, the legal recognition of her motherhood is unfairly limited. For these reasons, the current framework for ART violates Japanese constitutional guarantees of equal protection and must be rectified through legislative action.

A. *Japanese Women Turn to ART to Meet Social Pressure to Reproduce*

A combination of social and governmental forces pressure Japanese women to reproduce: social pressure to maintain the family line,⁷⁷ government pressure to curb the declining birth rate,⁷⁸ and legal pressure to conform to outdated definitions of parenthood.⁷⁹

Japanese women face strong social pressure to reproduce. The traditional burden on women to continue the family line endures. A variety of sources have criticized the “selfishness” of women who choose not to have children.⁸⁰ A 1999 book published a collection of interviews with Japanese women, expressing their feelings on the social stigma of being childless.⁸¹ Several women described experiencing “merciless social pressure” that left them “deeply tormented,” and caused feelings of depression and “worthlessness.”⁸²

Demographic changes in Japan, specifically low birth rate and population decline, add to the already high social pressure on Japanese

⁷⁵ See Tomatsu, *supra* note 36, at 194.

⁷⁶ See *id.* at 201.

⁷⁷ See *1st Surrogate Delivery Stirs National Debate*, DAILY YOMIURI, May 19, 2001.

⁷⁸ See Kozo Mizoguchi, *Japan’s Health Minister Rebuked for Calling Women “Birth Machines,”* SEATTLE TIMES, Jan. 30, 2007.

⁷⁹ See Bryant, *supra* note 11, at 112.

⁸⁰ See Miho Ogino, *Abortion and Women’s Reproductive Rights: The State of Japanese Women 1945-1991*, in *WOMEN OF JAPAN AND KOREA: CONTINUITY AND CHANGE* 69, 89 (Joyce Gelb & Marian Lief Palley eds., Temple Univ. Press 1994).

⁸¹ See Mami Fukae, *Books: Infertility Made Bearable*, ASAHI SHIMBUN (Osaka), Sept. 18, 1999.

⁸² See *id.*

women to reproduce.⁸³ Government statements indicate concerns that the decreasing birth rate will hurt the country's economic growth prospects and lead to higher costs for social welfare programs.⁸⁴ Many blame the declining population on advancements for women such as delays in marriage and childrearing, the increased use of contraception, and a greater presence in the workforce,⁸⁵ thus placing the responsibility to counter the effect of these social changes on women.⁸⁶ Japanese women are "assaulted by the pronatalist campaigns of those anxious to raise the falling birthrate,"⁸⁷ as displayed by a recent speech in which Health Minister Hakuo Yanagisawa referred to Japanese women as "birth machines."⁸⁸

Aside from the prevailing social pressure to reproduce, Japanese women also seek access to reproductive aids for individual fulfillment. More and more women face the prospect of infertility due to increased rate of cancer and other serious diseases.⁸⁹ Like women around the world, Japanese women challenged with infertility often experience depression, low self-esteem, and other mental health conditions.⁹⁰ Japanese women seek access to nontraditional methods of conception as a way to fulfill an individual desire to become a parent.

The increasing number of infertile women, government rhetoric urging women to reverse the dropping birth rate, and social pressure to have biological children, all serve to encourage a greater number of Japanese people to use ART to pursue parenthood. In response to the first public surrogate birth in Japan in 2001, a Japanese writer echoed the sentiment of many Japanese women by stating: "Women want to have babies even by extreme means such as surrogate motherhood or external fertilization with non-spouses. This is probably because Japanese society tells them that a

⁸³ See *Number of Infants Born in Japan Expected to Have Increased in 2006*, Health Ministry Data Says, KAISER NETWORK, Jan. 3, 2007, http://www.kaisernetwork.org/Daily_reports/rep_index.cfm?DR_ID=41894 (last visited May 2, 2008).

⁸⁴ See *id.*

⁸⁵ See Naohiro Ogawa, *Japan's Changing Fertility Mechanisms and Its Policy Responses*, 20 J. POPULATION RESEARCH n.1 (2003), available at <http://www.jpr.org.au/upload/JPR20-1pp89-106.pdf>.

⁸⁶ See Joyce Gelb and Marian Lief Palley, *Introduction to WOMEN OF JAPAN AND KOREA: CONTINUITY AND CHANGE* 1, 5 (Joyce Gelb and Marian Lief Palley eds., Temple Univ. Press 1994).

⁸⁷ See Ogino, *supra* note 80, at 91.

⁸⁸ See Mizoguchi, *supra* note 78. (Minister Yanagisawa reportedly said "The number of women between the ages of 15 and 50 is fixed. The number of birth machines [and] devices is fixed, so all we can ask is that they do their best per head" during a speech on the falling birthrate); see *id.*

⁸⁹ See Yayoi Emi et al., *Self Esteem in Women with Endometriosis*, 28 J. PSYCHOSOMATIC OBSTETRICS & GYNECOLOGY 79, Dec. 1, 2007.

⁹⁰ See *id.*

mature woman must have a child.”⁹¹ However, women who turn to ART face additional barriers before they can achieve parenthood.

B. Despite Disparate Pressure to Reproduce, Women Have Less Access to Technologies Which Address Female Infertility

While in theory, ART dramatically increases the resources that Japanese women have to reproduce, lack of access restricts the use of ART by women in Japan.

Currently, no statute exists in Japan that addresses the use of ART and the legal status of parents whose offspring are produced through ART.⁹² While the use of ART has steadily increased since the advent of in vitro fertilization, serious structural obstacles prohibit women from accessing important ART services. Voluntary rules implemented by medical societies, such as JSOG, act as the primary limit on access to ART.⁹³ JSOG disciplinary proceedings compel the enforcement of these rules, as members of JSOG will be expelled for providing services prohibited by its mandates.⁹⁴ JSOG private guidelines thereby have a serious effect on the public and prohibit women from accessing ART.⁹⁵ Beyond this practical effect, these rules also represent a model for future ART legislation, making the JSOG framework especially significant.⁹⁶

The guidelines established by JSOG discriminate against women by allowing men greater access to ART treatments and by reinforcing traditional and restrictive notions of parenthood. For example, JSOG approves of the use of artificial insemination, using either sperm from the father or through insemination from a third-party donor.⁹⁷ In contrast, JSOG prohibits the use of surrogacy or in vitro fertilization from third-party donor eggs.⁹⁸ Thus, if a married couple seeks infertility treatment because the husband is sterile, they have access to the use of a third-party's genetic material to remedy the

⁹¹ See *1st Surrogate Delivery Stirs National Debate*, *supra* note 77.

⁹² See Docket No. Heisei 18 ra 27 (Tokyo High Ct., Sept. 29, 2006) (translation on file with the Pacific Rim Law & Policy Journal). *see* Mayeda, *supra* note 7.

⁹³ See *1st Surrogate Delivery Stirs National Debate*, *supra* note 77.

⁹⁴ See Mayeda, *supra* note 7.

⁹⁵ See *1st Surrogate Delivery Stirs National Debate*, *supra* note 77.

⁹⁶ See *Unwed mom may have to face Nation's Mores*, MAINICHI DAILY NEWS (Tokyo), Dec. 15, 1998.

⁹⁷ See Mayeda, *supra* note 7.

⁹⁸ See Kohta Suzuki, et. al, *Analysis of National Representative Opinion Surveys Concerning Gestational Surrogacy in Japan*, 126 EUROPEAN J. OF OBSTETRICS AND GYNECOLOGY & REPRODUCTIVE BIOLOGY 39, 40 (2006); *Clear Guidelines Needed*, *supra* note 17.

problem.⁹⁹ However, if the wife is sterile or fails to produce eggs, available medicine provides little or no aid for her condition.¹⁰⁰ When asked why the organization permitted the use of third-party sperm but not donated eggs, the President of JSOG, Kazuo Sato, responded: "Eggs play the leading role in reproduction. Sperm can be easily collected. But collecting eggs is physically demanding on the woman. The number of eggs is also limited."¹⁰¹ While the concerns expressed by JSOG are medically valid, this argument fails to justify the disparate treatment of men and women. Although quality eggs are less abundant than sperm, the limited access to donations and the medical risks to the donor do not explain the ban on the donation of third-party eggs. Placing the "leading role" on women and their production of eggs echoes historical depictions of women as bearing the primary burden of reproduction.

C. *Registration Laws Prevent Women Who Conceive Through ART from Having Their Motherhood Legally Recognized*

Once a woman overcomes the hurdle of acquiring access to ART services, she faces the additional challenge of having her motherhood legally recognized. The Family Registration Law and court interpretations of Japanese family law prevent Japanese women from having equal access to the registration of parenthood, while men have significantly more access.

1. *The Family Registration Law Both Creates the Need for ART and Discriminatorily Restricts Access to Legal Parenthood*

Japan's Family Registration Law provides the framework for legal recognition of parenthood.¹⁰² The Family Registration Law limits parenthood options by defining legal parenthood narrowly,¹⁰³ reinforcing a traditional model of family and by enabling stigmatization of children born in a nontraditional manner, such as adoption, by recording birth status and risking the release of that information to the public.¹⁰⁴

The Family Registration Law requires that all Japanese nationals be registered.¹⁰⁵ The family *koseki*, or registry, records and recognizes all legal

⁹⁹ See *Unwed mom may have to face Nation's Mores*, *supra* note 96 (JSOG requires that artificial insemination be accessible only to legally married couples).

¹⁰⁰ See *Mayeda*, *supra* note 7.

¹⁰¹ See *Clear Guidelines Needed*, *supra* note 17.

¹⁰² See *Bryant*, *supra* note 11, at 112.

¹⁰³ See *id.*

¹⁰⁴ See *id.*

¹⁰⁵ See *id.*

births, marriages, divorces and deaths.¹⁰⁶ Materials included in the *koseki* include: a person's family and given names; date of birth, marriage, and death; adoption status, and the names of the father and mother.¹⁰⁷ If a person is adopted, the registry includes the names of the adoptive father and mother.¹⁰⁸

Current family registration requirements reflect the lasting impact of traditional Japanese culture, where the institution of family provided the hierarchical foundation for society. The Japanese elite historically maintained an extensive clan system,¹⁰⁹ which assigned to women the very limited responsibilities of providing heirs, caring for children, and serving men.¹¹⁰ Although lower class women traditionally enjoyed more equality of the sexes and fluidity in family roles,¹¹¹ Japanese law formalized the hierarchical "house" system with the 1871 Family Registration Law,¹¹² which divided all families by "house."¹¹³ Under this system, women needed approval by the male head of the household to move, marry, divorce or adopt.¹¹⁴ The Family Registration Law also diminished the role of women by excluding mistresses from the "house."¹¹⁵ The Family Registration Law memorialized hierarchical social structures that openly discriminated against women.¹¹⁶

Despite reforms,¹¹⁷ the Japanese government continues to refer to the social structure underlying the original family register as a derivation of the relationship between the government and the citizens, emphasizing the values of obedience, loyalty, and the acceptance of hierarchical decision-making.¹¹⁸ In combination with government language, Japan's Family Registry System ultimately promotes traditional notions about gender roles and about a woman's "proper place" and conduct in Japanese society.¹¹⁹

¹⁰⁶ See *id.*

¹⁰⁷ See *id.*

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See Luera, *supra* note 30, at 612.

¹¹¹ See Bryant, *supra* note 11, at 142.

¹¹² See Ministry of Justice Research and Training Institute, *Introduction to Family Registration Law in Japan*, at 4 (1998); Bryant, *supra* note 11, at 145.

¹¹³ See Bryant, *supra* note 11, at 145.

¹¹⁴ See AC Oppler, *Legal Reform in Occupied Japan: A Participant Looks Back*, in JAPANESE LEGAL SYSTEM 116, 118 (Meryll Dean, Cavendish Publishing Limited 2002) (1997).

¹¹⁵ See Bryant, *supra* note 11, at 147-48.

¹¹⁶ See *id.*

¹¹⁷ See Marius B. Jansen, *THE MAKING OF MODERN JAPAN* 747 (Belknap Press of Harvard University Press 2000).

¹¹⁸ See Bryant, *supra* note 11, at 158.

¹¹⁹ See Luera, *supra* note 30, at 612.

Partly due to reinforcement by the Family Registry System, the maintenance of a “pure” family registry continues to have social significance in Japan. The Japanese use *koseki* in everyday life as proof of a person’s background and character.¹²⁰ Adoption is evidence of an “undesirable irregularity in family background that raises doubts about whether the individual has been properly socialized and about the strength of the bond between that individual and others in the family.”¹²¹ Also, any potential infertility noted in the family registry makes the person vulnerable to stigmatization and discrimination.¹²²

Although less so today than in the recent past, evidence of irregular events in the family registry may jeopardize both the parents’ and child’s chances of success in the future.¹²³ Schools, banks and parents of potential spouses have, in the past, used, and, to some extent, continue to use, a person’s family background, including the *koseki*, to evaluate that person’s lineage, social upbringing, and moral character.¹²⁴ In this way, blemishes on the family registry have the potential to severely impact a person’s quality of life.

Some reforms have attempted to limit the discriminatory impact of adoptions records. For example, the legislature amended the Japanese adoption law in 1987 to allow for “special adoptions,” which remove information regarding adoption from the family registration records.¹²⁵ However, access to special adoptions is limited and the *koseki* maintains references to the authorization given by the Family Court to change the record. The record still indicates that the child has an unusual past.¹²⁶ Also, the adoption remains on the *koseki* of the birth mother.¹²⁷ These provisions render the amendment ineffective at concealing adoptions.¹²⁸

Recent legal developments have limited access to the information contained in the *koseki* and increased regulations regarding the distribution of personal information. A new law passed in April of 2007 and implemented on May 1, 2008 limits which third parties may obtain copies of

¹²⁰ See Bryant, *supra* note 11, at 145.

¹²¹ *Id.* at 135.

¹²² *Id.* at 158.

¹²³ *Id.* at 133.

¹²⁴ *Id.* at 112.

¹²⁵ *Id.* at 138-39.

¹²⁶ *Id.*

¹²⁷ *Id.* at 138.

¹²⁸ *Id.*

family registrations.¹²⁹ The new law also requires that authorized third parties, such as attorneys and local government officials, provide a legitimate purpose for requesting the information before it will be provided to them.¹³⁰

Such reforms indicate progress, but do not provide a complete solution. Even without direct discrimination, fear that the information will be obtained and used for discriminatory purposes encourages individuals to avoid any tarnish to the family registry.¹³¹ Also, the use of the *koseki* continues the notion that “traditional” families are superior to families created through adoption or unmarried partners.¹³² Therefore, the Family Registration System continues to reinforce the traditional family model and perpetuate associated discrimination.

Under the threat of harsh stigmas, Japanese citizens considering parenthood have a strong incentive to have children in ways that allow for registration in the traditional manner without a sign of irregularity.¹³³ This encourages Japanese women to have children in a way that most closely replicates the traditional family. While increasing the need for ART, the Family Registration Law simultaneously restricts access to ART for women because children born using certain technologies are not recognized. The law currently allows a man whose wife gives birth to a child using third-party sperm to have his parenthood recognized after completing official procedures.¹³⁴ Based on the presumption that a father can accept an illegitimate child, Article 779 and Article 783 of the Civil Code allow a father to affiliate with a child, including a child that is not yet born.¹³⁵ Article 772 of the Civil Code establishes the legal presumption that a child conceived by a wife during marriage is presumed to be the child of her husband.¹³⁶

Although mothers are also legally allowed to affiliate with their children under the same provisions, motherhood of children conceived

¹²⁹ *Privacy law Limits Access to ‘Koseki’*, JAPAN TIMES ONLINE, Apr. 28, 2007, <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html> (last visited Oct. 28, 2008).

¹³⁰ *See id.*

¹³¹ *See Bryant, supra* note 11, at 133.

¹³² *See Taimie Bryant, Family Models, Family Dispute Resolution, and Family Law in Japan*, 14 UCLA PAC. BASIN L.J. 1, 1-4 (Fall 1995).

¹³³ *See supra* notes 120-133 and accompanying text.

¹³⁴ *See New Definition of ‘Legal Parent’ Eyed*, ASAHI SHIMBUN, June 20, 2003.

¹³⁵ Article 772 of the Civil Code, *available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf>.

¹³⁶ Articles 779 and 783 of the Civil Code, *available at* <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf>.

through some forms of ART is not recognized.¹³⁷ Registration issues increasingly provide a barrier to legal motherhood when mothers use surrogacy or other disfavored forms of ART.¹³⁸ For example, many Japanese couples travel outside of Japan for assistance, going to countries such as Korea, Australia, and the United States to find a surrogate.¹³⁹ Upon returning to Japan, women secretly register their babies born by surrogate mothers by telling local officials that they gave birth to the babies while traveling abroad.¹⁴⁰ Women may be asked to prove they gave birth by providing hospital records or other salient evidence.¹⁴¹ If women fail to provide such evidence, the choice of how to proceed is left within the discretion of local officials.¹⁴² Japanese law provides these officials with no guidance for handling these circumstances.¹⁴³ The unclear legal framework leaves local agents and courts to deal with the legal consequences of advancing science.

2. *Courts Deny Recognition of Motherhood by Using Discriminatory Standards That Promote Outdated Concepts of Family*

Courts also restrict recognition of women as mothers whose children are born using ART. Japan's failure to provide the legislation necessary to deal with cases involving ART forces Japanese courts to craft judicial solutions to solve problems that arise from applying the law.¹⁴⁴ Although these cases bind future courts only in a limited way under the Japanese legal system,¹⁴⁵ they exemplify judges' use of outdated Japanese legal principles to deal with the issues of parenthood involving ART. In general, case law applies two criteria to determine legal parenthood arising out of illegitimate parenthood cases: the act of "parturition" (giving birth) and the consent of

¹³⁷ See Mayeda, *supra* note 7.

¹³⁸ See *Surrogate Births Raise Complex Issues*, *supra* note 18.

¹³⁹ See *Japan Caught in Dilemma of Surrogate Births*, ASAHI SHIMBUN, reprinted in CHINA DAILY, Mar. 27, 2007; *Mukai Ruling Stirs Debate, Highlights gaps Between Law, Reality over Surrogate Births*, DAILY YOMIURI, Mar. 25, 2007 (quoting the head of the Japan Office for the Nevada Center for Reproductive Medicine as saying, "Almost all babies born through surrogate birth overseas have been registered in Japan as the commissioning couple's children by birth.").

¹⁴⁰ *Surrogate Births Raise Complex Issues*, *supra* note 18.

¹⁴¹ 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo.-No..47.html>.

¹⁴² See *Surrogate Births Raise Complex Issues*, *supra* note 18.

¹⁴³ See *Japan Caught in Dilemma of Surrogate Births*, *supra* note 139.

¹⁴⁴ 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo.-No..47.html>.

¹⁴⁵ See Lawrence W. Beer & Hidenori Tomatsu, *A Guide to the Study of Japanese Law*, 23 AM. J. OF COMPARATIVE LAW 284, 288 (1975).

the husband.¹⁴⁶ A review of recent court decisions shows how this standard results in continued disparate treatment between men and women.

Japanese courts generally provide for legal fatherhood in cases involving ART.¹⁴⁷ In 2004, Japan's first in vitro fertilization case involved a married couple who learned shortly after their marriage that the husband had leukemia.¹⁴⁸ Before beginning treatment, the husband preserved his sperm on the condition that if he died, the sperm bank would destroy the sperm.¹⁴⁹ The husband then told his wife and parents that if he died, he still wanted his wife to use the sperm to have his child.¹⁵⁰ After his death, the wife successfully underwent artificial insemination and gave birth.¹⁵¹ When the wife brought the child for registration as the child of the husband, the authorities refused to register the child under his father's name, finding that "the social perception that a baby born in such a way is a child of the dead husband is not sufficiently strong."¹⁵²

The Takamatsu Superior Court vacated the ruling and held that the record should officially recognize the child as the offspring of the husband because it fulfilled the wishes of the husband and the best interests of the child.¹⁵³ The court reasoned that such registration conferred an actual benefit to the child both because it allowed a legal relationship between the child and the husband's family and provided for the child's inheritance from the father's relatives.¹⁵⁴ The Japanese Supreme Court reversed this ruling in 2006.¹⁵⁵ The Court held that because the current Civil Code did not recognize posthumous reproduction, the father-son relationship could not be recognized because such a rule would impose an "unexpectedly heavy burden" on the father.¹⁵⁶

Although the Supreme Court eventually concluded that the fatherhood should not be recognized, the rationale used by the Court indicates the very

¹⁴⁶ See Mayeda, *supra* note 7.

¹⁴⁷ See 57 KÖMINSHŪ 32 (Takamatsu High Ct., July 16, 2004) (translation on file with the PAC. RIM L. & POL'Y J.).

¹⁴⁸ See *id.*

¹⁴⁹ See *id.*

¹⁵⁰ See *id.*

¹⁵¹ See *id.*

¹⁵² See Mayeda, *supra* note 7.

¹⁵³ 57 KÖMINSHŪ 32 (Takamatsu High Ct., July 16, 2004) (translation on file with the PAC. RIM L. & POL'Y J.).

¹⁵⁴ See *id.*

¹⁵⁵ 60 MINSHŪ 7 (Sup. Ct., Sept. 9, 2006), available at <http://www.courts.go.jp/english/judgments/text/2006.09.04-2004.-Ju.-No.1748.html>; See also *JSOG Against Posthumous Reproduction*, DAILY YOMIURI, Dec. 10, 2006.

¹⁵⁶ See 60 MINSHŪ 7 (Sup. Ct., Sept. 9, 2006), available at <http://www.courts.go.jp/english/judgments/text/2006.09.04-2004.-Ju.-No.1748.html>

minimal standard which men must meet in order to have their fatherhood recognized. The father need only consent to the parenthood and be alive to do it. This exhibits the method which judges use in determining whether certain facts establish a father-child relationship. Article 779 of the Civil Code allows a father or a mother to affiliate with a child born out of wedlock.¹⁵⁷ Applying this reasoning to the facts of this case, the Supreme Court stated, “it seems necessary and sufficient that a parent-child relationship by blood exists between the child and the father and that the father has consented to the Artificial Reproduction that resulted in the conception of the child.”¹⁵⁸ Under this standard, a father need only be alive and consent to be considered father of a child. While Japanese actors originally devised this interpretation of the law to apply to children born out of wedlock, the Supreme Court now uses the doctrine to recognize a child born through artificial insemination.¹⁵⁹

Courts show less willingness, however, to provide for a broad definition of legal motherhood. Modern decisions on this issue follow a 1962 court opinion that determined that a woman who gave birth to a child out of wedlock did not need to acknowledge the child as her own in order for the mother-child relationship to exist.¹⁶⁰ Later courts applied the holding in this case to stand for the proposition that women must physically give birth to the child in order for the law to acknowledge her motherhood.¹⁶¹

The Japanese Supreme Court recently applied the 1962 decision to a controversial case regarding international surrogacy. Japanese media celebrity Aki Mukai and her husband Nobuhiko Takada, a professional wrestler, sought out a surrogacy contract after Mukai’s hysterectomy due to uterine cancer.¹⁶² She preserved her eggs before undergoing the operation.¹⁶³ In 2002, the couple entered into a surrogacy contract with an American woman in Nevada to have Mukai’s eggs artificially inseminated with her husband’s sperm and implanted in the American woman’s womb for gestation.¹⁶⁴ The surrogate successfully conceived and gave birth to twin

¹⁵⁷ Article 779 of the Civil Code, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf>.

¹⁵⁸ 60 MINSHŪ 7 (Sup. Ct., Sept. 9, 2006), available at <http://www.courts.go.jp/english/judgments/text/2006.09.04-2004.-Ju-.No..1748.html>.

¹⁵⁹ See Mayeda, *supra* note 7.

¹⁶⁰ 60 MINSHŪ 445 (2nd Petty Bench of the Sup. Ct., Apr. 27, 1962) (translation on file with the PAC. RIM L. & POL’Y J.) (holding that only evidence of birth was required to prove the relationship between a mother and her illegitimate child).

¹⁶¹ 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

¹⁶² See *id.*

¹⁶³ See *id.*

¹⁶⁴ See *id.*

boys in Nevada in 2003.¹⁶⁵ A Nevada State Court approved the surrogacy contract and granted Mukai and her husband legal recognition of their parenthood, granting no parental rights to the host mother.¹⁶⁶ The State of Nevada issued birth certificates with the Japanese couple listed as the birth parents.¹⁶⁷

However, when the couple returned to Japan and attempted to register the children as Mukai's children, the authorities denied their application due to inability to verify "the fact of delivery."¹⁶⁸ Although a local family law court upheld this determination, the Takamatsu High Court reversed in 2004, reasoning that "simply because methods of creating and having children other than natural childbirth could not be thought of at the time the laws were established is not a reason to refuse to allow their acceptance into our legal order."¹⁶⁹ Applying a "best interests" test, the court ruled that Mukai should be registered as the legal mother of the twins.¹⁷⁰ In 2007, the Japanese Supreme Court held that "[t]he current legal system of Japan had not contemplated situations where conception or delivery of a child may be achieved also by way of artificial manipulation" and therefore the children could not be recognized as Mukai's children under Japanese law.¹⁷¹

However, in this case, because Nevada had already ruled on the question, the Court had to address the additional question of whether Japanese courts should adopt the Nevada determination.¹⁷² In order for the court to accept the judgment of a foreign court the judgment may not "contrary to the public policy in Japan."¹⁷³ The court concluded that in this case, accepting the judgment that Mukai could be recognized as the mother of the twins violated public policy, based partly on the arguments laid out by JSOG and the Assisted Reproductive Technology Committee, discussed above.¹⁷⁴

Following the 1962 judicial precedent holding that the act of giving birth determines motherhood,¹⁷⁵ the Court stated that public policy requires

¹⁶⁵ See *id.*

¹⁶⁶ See *id.*

¹⁶⁷ See *id.*

¹⁶⁸ See *id.* In reality, the amount of press on the situation had warned the local officials that Mukai would be attempting to register her child. See *Mukai Ruling Stirs Debate*, *supra* note 139

¹⁶⁹ See 1957 HANREI JIHO 20 (Tokyo High Ct., Sept. 29, 2006) (translation on file with the PAC. RIM L. & POL'Y J.).

¹⁷⁰ See *id.*

¹⁷¹ 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo.-No..47.html>.

¹⁷² See *id.*

¹⁷³ See *id.*

¹⁷⁴ See *id.*

¹⁷⁵ See *id.* (citing 60 MINSHŪ 445 (2nd Petty Bench of the Sup. Ct., Apr. 27, 1962)).

definite criteria for eligibility of a parent-child relationship, especially considering that the drafters of the Civil Code had not contemplated recognition of parenthood by ART.¹⁷⁶ The court explained:

A natural parent-child relationship is the most fundamental relationship concerning a person's status. It is the foundation for various relationships in social life, and in this respect, it does not only concern matters between private persons but is also deeply involved in the public interest, and it has a material impact on child welfare. The eligibility for a natural parent-child relationship is an issue concerning the fundamental principle or fundamental philosophy that serves as the basis of the rules of law on personal status in each country. Therefore, the criteria for the eligibility for a natural parent-child relationship should be definite and clear¹⁷⁷

On this basis, the Court concluded that even when a woman donates her own egg to a surrogate mother, she cannot have a mother-child relationship with the child.¹⁷⁸ The mother of the child is the woman who delivered the child.¹⁷⁹

Thus as the current Japanese case law stands, a woman who donates her genetic material to the production of a child will not be recognized as the legal mother,¹⁸⁰ but the father who donates his genetic material may be legally recognized as the father.¹⁸¹ Also, a father need not be genetically related to the offspring in order for legal recognition to attach, whereas a mother who gives birth to a child born from a donated egg cannot be recognized as the legal mother.¹⁸² This legal framework, coupled with the limitations on access to the required technologies, treats women in an unreasonably different manner than men that is discriminatory under Japanese law.

¹⁷⁶ *See id.*

¹⁷⁷ *See id.*

¹⁷⁸ *See* 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

¹⁷⁹ *See id.*

¹⁸⁰ *See id.*

¹⁸¹ 57 KŌMINSHŪ 32 (Takamatsu High Ct., July 16, 2004) (translation on file with Pacific Rim Law & Policy Journal).

¹⁸² *See* Mayeda, *supra* note 7.

D. *The Current Regulatory Scheme for ART Violates Japan's Constitutional Principles and CEDAW by Causing Unreasonable Discrimination Against Women*

The current legal framework prohibits women from enjoying benefits of parenthood and ART to which men have access. The combination of disproportionate pressure placed on women to bear the burden of reproduction and the restricted access to both ART and registration of children born using ART unfairly violates equal protection provisions of the Constitution and CEDAW, even considering judicial limitations.

As discussed above,¹⁸³ a successful equal protection challenge in Japanese courts must prove that government action causes unreasonable discrimination.¹⁸⁴ Discrimination against women in the ART context meets this burden. Discriminatory access and recognition of some families and not others constitutes government action. Legal recognition of motherhood for women whose children are born using ART is “reasonably necessary” to prevent “unreasonable discrimination.” Additionally, the failure to provide a statutory framework for ART violates CEDAW because actual discrimination results from application of existing law.¹⁸⁵

A case successfully challenging Family Registry procedures, although not decided on equal protection grounds, provides a model for making this argument.¹⁸⁶ The plaintiffs argued that the forms used to record family information in the *koseki* discriminated against children born out of wedlock and therefore violated Articles 13 and 14 of the Constitution.¹⁸⁷ The system listed legitimate children by their birth order but non-marital children only by their gender. Although the form listed the children in the same column, the registry clearly indicated which children were born out of wedlock.¹⁸⁸ In 2004, the Tokyo District Court held that although the Family Registration System had a legitimate purpose, no legitimate purpose existed in distinguishing children born out of wedlock.¹⁸⁹ Therefore, requiring such information to be published in the *koseki* violated the children's right to privacy.¹⁹⁰ The Japanese government amended enforcement provisions of

¹⁸³ See *supra* Part II.B.

¹⁸⁴ See Luera, *supra* note 30, at 621.

¹⁸⁵ CEDAW, *supra* note 24.

¹⁸⁶ See Teruki Tsunemoto & Daryl Takeno, *Trends in Japanese Constitutional Law Cases: Jurisuto Commentary on Important Judicial Decisions for 2004*, 8 ASIAN-PAC. L. & POL'Y J. 138, 142-143 (2006).

¹⁸⁷ See *id.*

¹⁸⁸ See *id.*

¹⁸⁹ See *id.*

¹⁹⁰ See *id.* at 145.

the Family Registration Law and the statute now requires identical recording of children born inside and outside the marriage.¹⁹¹

The court did not, however, explicitly rule on the equal protection-Article 14 claim raised by the plaintiffs.¹⁹² The Tokyo High Court upheld the District Court decision, but emphasized that it would not violate the Constitution to differentiate between legitimate and illegitimate children.¹⁹³ Although the equal protection argument in this case did not necessarily succeed, the High Court did not outright reject the argument.¹⁹⁴

The argument made in this case provides ground for a similar challenge to the discriminatory ART framework. Similar to the Tokyo High Court case, children born by ART are listed differently on the *koseki* depending on the circumstances of their birth. For example, the children born to surrogate mothers would have to be listed as born to another woman and then adopted by the mother, resulting in social stigma to the child and family. Distinguishing children in the *koseki* based on the technological circumstances of their birth serves no legitimate purpose. Additionally, this result discriminates against women by providing more options for reproductive assistance to men than are provided to women.

Opponents might argue that the disparate treatment of men and women is reasonable because it serves a legitimate purpose in light of public policy concerns. For example, in the case over Mukai's children,¹⁹⁵ the Japanese Supreme Court explained that public policy required clear criteria for parenthood, as a fundamental principle of the Japanese legal foundation.¹⁹⁶ The Court also argued that not allowing registration of children born by surrogacy is "conducive to the child's welfare."¹⁹⁷ Opponents continually justify the lack of legal provisions for unconventional legal motherhood by claiming that they are protecting the welfare of the children.¹⁹⁸ These arguments would likely be used to support the status quo to the effect that existing policy is reasonable and not "unreasonably discriminatory."

In reality, the failure of legislative provisions to deal with children conceived through ART increases the risk to both the mother and child by

¹⁹¹ See *id.* at 144.

¹⁹² See *id.*

¹⁹³ See *id.* at 145.

¹⁹⁴ See *id.*

¹⁹⁵ See 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

¹⁹⁶ See *id.*

¹⁹⁷ See *id.*

¹⁹⁸ See *id.*; *Japan Caught in Dilemma of Surrogate Births*, *supra* note 139.

forcing families to go abroad to receive reproductive services. Banning ART would not provide a solution,¹⁹⁹ as couples will merely seek ART services on the black market or travel to places with lenient ART regulations in order to access the reproductive assistance they desire, potentially increasing both the costs of the procedure and risks to the child and parents.²⁰⁰ After her children were born by surrogate, Aki Mukai challenged the ban, stating: “The law has to be convincing, otherwise, there will be people who have babies secretly and that will lead to all sorts of tragedies.”²⁰¹

Additionally, indeterminate law puts children in peril.²⁰² For example, as a result of the Japanese Supreme Court decision refusing to recognize Mukai’s motherhood of her children born by surrogate, neither the United States nor Japan recognized a legal mother for Mukai’s twin boys.²⁰³

Opponents of changing the law argue that adoption of children born through ART already provides an alternative to parental recognition. This logic supports the existing legal structure, which is legally “reasonable” under Article 14 because it already allows for the children to be recognized in the family structure. The Supreme Court Justices Tsuno and Furuta suggested in their concurrence that Mukai and Takada could adopt the children through “special adoption,”²⁰⁴ a process laid out in Article 817-2 of the Civil Code that would extinguish the legal relationship between the children and their natural parents.²⁰⁵ This proposal fails to recognize the implications adoption has for children and parents within the legal and social framework of Japanese society.²⁰⁶ Adoption fails to provide a true alternative to legal recognition of motherhood in the *koseki* because it carries with it a stigma for children and families.²⁰⁷

In light of the legal limitations on recognizing the motherhood of women who use ART, the lack of a real alternative to such recognition, and the discrimination resulting from indications of ART placed on the child’s *koseki*, a Japanese court could agree that such a framework fails to provide equal protection of the law.

¹⁹⁹ See Hidekazu Tanaka, *Surrogate Rules Must Protect Rights*, DAILY YOMIURI, Oct. 30, 2003.

²⁰⁰ See *id.*

²⁰¹ See *Surrogate Moms Emerge from Shadows*, *supra* note 9.

²⁰² See *Japan Caught in Dilemma of Surrogate Births*, *supra* note 139 (“[M]any important questions remain unresolved despite the possible negative impact on the future of the concerned newborns.”).

²⁰³ See 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

²⁰⁴ See *id.*; *Japan Caught in Dilemma of Surrogate Births*, *supra* note 139.

²⁰⁵ MINPŌ, art. 817-2, available at <http://www.cas.go.jp/jp/seisaku/hourei/data/CC4.pdf>.

²⁰⁶ See Bryant, *supra* note 11, at 133.

²⁰⁷ See *id.*

IV. NEW LEGAL FRAMEWORK IS NEEDED TO ELIMINATE DISCRIMINATION IN JAPAN'S FAMILY LAW

The Constitution and CEDAW require Japan to take legislative action to eliminate discrimination against women. The failure of the Diet to provide a legal framework for the recognition of all children conceived by ART, and to redefine modern legal parenthood, creates actual discrimination. Japan must either repeal the discriminatory provisions of its Family Registration Law or provide a statutory framework that rectifies discrimination against women choosing ART.

One potential solution would be to amend the Family Registration Law. The Family Registration Law has been interpreted to prohibit the legal registration of children born to parents through certain ART procedures. Simultaneously, the law creates the need for access to ART by reinforcing social stereotypes about children not genetically related to their parents. This social stigma is so prevalent that it prevents parents from choosing adoption. In order to address the discrimination, the law must either be updated to provide for the registration of children produced through ART, or it must be amended or discarded to prevent discrimination. Allowing women to attain all of the legal benefits of parenthood by "adopting" their children without leaving traces of that "adoption" on the *koseki* is one potential solution to the social stigma perpetuated by the Family Registration Law.

A second solution is to create a legislative framework providing access for women to all comparable services provided to men and to grant women legal parenthood over children born through ART. Organizations have already proposed some legislative suggestions. For example, the Japanese Society of Fertility and Sterility supports more access to donor eggs by permitting ART with eggs donated from siblings.²⁰⁸

Some proposals seek to continue the existing discriminatory framework. The Japan Federation of Bar Associations recommends limiting access to ART in order to assure that children know their genetic heritage.²⁰⁹ The National Institute for Research Advancement also has proposed legislation that would restrict ART.²¹⁰ A bill to ban surrogate births was considered but shelved due to lack of support in the Diet.²¹¹ Although discussion of a legislative ban has risen recently, strong opposition is

²⁰⁸ See Mayeda, *supra* note 7.

²⁰⁹ See *id.*

²¹⁰ See *id.*

²¹¹ See *Japan Caught in Dilemma of Surrogate Births*, *supra* note 139.

expected to prevent such a ban from coming to fruition for a few years at least.²¹²

Supporters of surrogacy have proposed legislative solutions that allow surrogacy, but limit the availability. For example, Dr. Yahiro Netsu, director of the Suwa Maternity Clinic in Shimosuwa-machi, Nagano Prefecture, proposed limiting surrogacy to married women who cannot, for biological reasons, have children.²¹³ He also proposed criminal penalties for doctors, traders, or parents who undertake surrogacy for commercial purposes, allowing compensation only to cover the costs for women who volunteer to act as surrogates.²¹⁴ Additionally, Dr. Netsu would allow the surrogates to abort the fetus before the 22nd week of pregnancy.²¹⁵ Dr. Netsu's clinic has assisted at least five infertile married couples in giving birth using a surrogate²¹⁶ and at least 160 infertile married couples using artificial insemination.²¹⁷ JSOG expelled Dr. Netsu in 1998 for violating its guidelines, but reinstated him after a 2003 lawsuit.²¹⁸

Although the groups dispute the shape legislation should take, many agree that legislative action is necessary. In addition to interested organizations and government bodies mentioned above, the Japanese Supreme Court has also called for legislative action. The Court stated, "[s]ince surrogate birth, which was not anticipated under the Civil Code, actually occurs and is expected to continue to occur in the future, it is necessary to start discussion about how to treat surrogate birth under the existing legal system."²¹⁹

Although members of the Diet have repeatedly expressed interest in providing a statutory framework, no such legislation has been passed.²²⁰ Japan is considering legislative action.²²¹ A government-sponsored committee has proposed guidelines that would perpetuate the disparity in

²¹² See *Surrogate Moms Emerge from Shadows*, *supra* note 9.

²¹³ See *Doc: Allow Surrogacy, But Not on Cash Basis*, DAILY YOMIURI, Feb. 27, 2007.

²¹⁴ See *id.*

²¹⁵ See *id.*

²¹⁶ See *40 Women Apply to be Surrogates*, DAILY YOMIURI, Aug. 25, 2007.

²¹⁷ See *84 Women Give Birth Using Donated Ova, Sperm*, *supra* note 8.

²¹⁸ See *id.*

²¹⁹ See 61 MINSHŪ 2 (Sup. Ct., Mar. 23, 2007), available at <http://www.courts.go.jp/english/judgments/text/2007.03.23-2006.-Kyo-.No..47.html>.

²²⁰ See *Law on Surrogacy Still Long Way Off*, DAILY YOMIURI, Feb. 2, 2008.

²²¹ *Japanese Government to Consider Supporting Assisted Reproductive Technologies, Surrogate Births, Officials Say*, MEDICAL NEWS TODAY, Oct. 23, 2006, <http://www.medicalnewstoday.com/articles/54598.php> (last visited May 2, 2008); *Surrogate Births, Japan Debates*, MEDICAL NEWS TODAY, Feb. 27, 2004, <http://www.medicalnewstoday.com/articles/6193.php> (last visited May 2, 2008); *Panel to Discuss Surrogacy*, JAPAN TIMES ONLINE, Dec. 1, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20061201a3.html> (last visited May 2, 2008).

access to ART. The Ministry of Health, Labor, and Welfare established the Assisted Reproductive Technology Committee under the Health Science Council in October 1998.²²² The Committee issued a report in 2003 limiting eligibility for fertility treatment using donor sperm, eggs, and embryos to legally married couples of a certain age (women not older than 50 years of age).²²³ The Report also recommended limiting what kind of ART methods may be accessed, specifically prohibiting the use of surrogacy and the implantation of embryos created by donor sperm or eggs.²²⁴ The *Japan Times* reported the Committee's reasoning in 2006: "[s]urrogacy ignores natural ties between mother and children that are naturally formed through pregnancy and birth and runs counter to the welfare of children"²²⁵ Most recently, the same subcommittee issued a report stating that legislation is necessary to prohibit surrogacy.²²⁶ The Committee reasoned that the right to have children did not extend to passing the risk inherent in childbirth to another woman, especially if women were coerced into becoming surrogates.²²⁷

The passage of legislation clarifying this area of law will depend on public opinion.²²⁸ A social consensus would make the courts more likely to accept ART and encourage opposition to relinquish strict policy positions on the issue.²²⁹ Social consensus is gradually developing as more women turn to ART in order to conceive.²³⁰ Although the public has traditionally disfavored surrogacy, recent surveys show public support for surrogacy at over 50%.²³¹ The State Minister for Science and Technology, Koji Omi, responded to the first reported Japanese surrogate birth in 2001 by stating, "I doubt whether society should prohibit a person from pursuing happiness in a way that does not cause trouble to others."²³² Further, while continuation of the blood line traditionally held a prominent place in Japanese culture, a 2003 study funded by the Ministry of Health, Labor, and Welfare showed

²²² See Mayeda, *supra* note 7.

²²³ See *id.*

²²⁴ See *id.*

²²⁵ See *Surrogate Births Raise Complex Issues*, *supra* note 18.

²²⁶ See *Report Struggles with Surrogacy Issue*, DAILY YOMIURI, Mar. 25, 2008.

²²⁷ See *id.*

²²⁸ See Mayeda, *supra* note 7.

²²⁹ See *id.*

²³⁰ See *Public Support for Host Surrogacy Tops 50%*, JAPAN TODAY, Nov. 17, 2007, available at <http://www.japantoday.com/jp/news/421139>; *Public Support for Host Surrogacy Tops 50% for First Time*, JAPAN TIMES, Nov. 8, 2007, available at <http://search.japantimes.co.jp/print/nn20071108a8.html>.

²³¹ See *Public Support for Host Surrogacy Tops 50%*, *supra* note 230; *Public Support for Host Surrogacy Tops 50% for the First Time*, *supra* note 230.

²³² See *Surrogate Birth Ban Questioned*, DAILY YOMIURI, May 23, 2001.

that the Japanese people have come to think that caring for and raising the child impact the child more than the act of giving birth.²³³

V. CONCLUSION

The combination of social pressure on families to have children, and legal and social pressure for those children to be biologically related to the family, cause more and more Japanese to turn to ART. Japan's failure to adapt registration requirements, or to provide for a legal infrastructure for this rapidly expanding science, have resulted in discriminatory effects - married, heterosexual men have access to options for legal parenthood despite problems with infertility that similarly situated women do not. The discriminatory effect of this legal framework must be rectified for Japan to comply with its Constitution, the Basic Law and CEDAW.

²³³ See Mayeda, *supra* note 7.